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No. 05-1449

In the Supreme Court of the United States

OCTOBER TERM, 2005

TIMOTHY B. HUFFMAN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF OF *AMICI CURIAE* ALLIANCE FOR COMMUNICATIONS DEMOCRACY AND ALLIANCE FOR COMMUNITY MEDIA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*

At issue in this case is the unprecedented criminal conviction of a public access cable television programmer under a state indecent exposure law based on the content of his non-obscene, constitutionally protected cable television programming. [1]

In *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727, 760-66 (1996), this Court struck down, as contrary to the First Amendment, a federal statute allowing cable operators to censor non-obscene, indecent programming on cable access channels. In doing so, the Court recognized the long history of effective community regulation of the time, place and manner of constitutionally protected speech on cable system public access channels. Even more than the cable operator censorship of "indecent" access programming struck down in *Denver Area*, Michigan's use of a state indecent exposure statute to criminalize nudity on cable television would, if allowed to stand, "radically change present programming-related relationships among local community and nonprofit supervising boards and access managers," and would "greatly increase the risk that certain categories of programming (say, borderline offensive programs) will not appear." *Id.* at 766.

As the primary national membership organizations representing public access community supervising boards,

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amici*, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

access managers, and public access programmers and viewers, the interests of the *amici,* Alliance for Community Media ("ACM") and Alliance for Communications Democracy ("ACD"), are directly implicated by the Michigan court's radical departure from settled First Amendment law.

ACM is a national non-profit member organization representing over 3,000 Public, Educational and Governmental ("PEG") access organizations, community media centers, programmers, and viewers throughout the nation. Those centers include the more than 1.2 million volunteers and 250,000 community groups that provide PEG access television programming in local communities across the United States. ACD is a national membership organization of nonprofit access corporations in communities across the country. The organizations represented by *amici* have helped thousands of members of the public make use of public access channels that have been established in their communities pursuant to local franchise agreements and federal law, 47 U.S.C. § 531.

ACD and ACM filed amicus briefs below before the circuit court, court of appeals and Supreme Court of Michigan in support of Huffman in this case. In addition, ACD and ACM have participated as parties or *amicus curiae* in a wide range of cases involving First Amendment issues important to the public access community. Most notably, ACD and ACM were petitioners in the *Denver Area* case, which the decision below directly undercuts.

Because of their substantial experience and interest in issues relating to public access and their unique understanding of the dangerously broad ramifications of the

decision below, *amici* are well situated to assist the Court in its consideration of this case.

The application of a public indecency statute to ban and criminalize non-obscene cable programming will chill constitutionally protected speech on public access. If the decision below is not reviewed and overturned by this Court, that chilling effect will not be confined to Michigan. Groups advocating greater morality in television view the decision below as a springboard for urging other states to construe their public indecency laws in a similar manner. This Court's review is therefore warranted.

INTRODUCTION

For five decades, public access channels have provided a public forum for those who otherwise would have no means to communicate via cable television, a medium that "stands at the center of an ongoing telecommunications revolution with still undefined potential to affect the way we communicate and develop our intellectual resources." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 627 (1994).

Public access has its origins in the 1960s, when a small number of cable systems began transmitting programming provided by local citizens. *See generally* R. Engelman, *The Origins of Public Access Cable Television 1966-1972*, Journalism Monographs, No. 123 (Oct. 1990). Over time, municipalities responded to citizen desires for a "direct right of access" to the cable medium through franchise agreements requiring cable operators to reserve channel capacity for PEG channels as part of the consideration they give for access to public rights of way. *See* H.R. Rep. No. 98-934, at 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667 ("*1984 House Report*").

In 1984, Congress enacted the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984), *codified as* Title VI of the Communications Act of 1934, 47 U.S.C. §§ 521 *et seq.* (2000) ("the 1984 Act"). To further the goal of providing "the widest possible diversity of information sources and services to the public," 47 U.S.C. § 521(4), the 1984 Act ratified local governments' authority to require cable operators to provide channels for public access as a condition for franchise approval, 47 U.S.C. § 531(b), and prohibited operators from "exercis[ing] any editorial control over any" constitutionally protected expression appearing on access channels, 47 U.S.C. § 531(e). Federal law thus affirmed the role of public access channels to "provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas." *1984 House Report*, at 30.

Today, thousands of community groups and over one million volunteer producers, directors, presenters and technical staff participate in the production of more than 20,000 hours of new local programming each week, more than all the programming produced by NBC, CBS, ABC, Fox and PBS combined.[2] Consistent with the purpose of public access channels as open forums for citizen speech, franchises or local regulations traditionally provide that the channels

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[2] Alliance for Community Media, *About Community Media, Quick Facts on Media Access, available at* http://www.alliancecm.org/index.php?page_id=2 (last visited June 12, 2006). Public access stations reach approximately 30 million homes and 70 million people. Margie Nicholson, *Cable Access: A Community Communications Resource for Nonprofits*, Bulletin 3 (Benton Foundation, Washington D.C., April 1990) at 7.

may be used by the general public on a nondiscriminatory basis for any non-commercial, constitutionally protected programming.[3] In practice, given court rulings in the area of cable programming, franchising authorities prohibit obscene, but not indecent, cable programming.

Public access boards and franchising authorities also have taken additional steps, appropriate to their communities, to regulate the time, place and manner of indecent or otherwise potentially offensive cable programming. As the Court summarized in *Denver Area,* public access channels "are normally subject to complex supervisory systems of various sorts, often with both public and private elements." 518 U.S. at 761. Most franchising authorities require public access cable programmers to sign an agreement not to disseminate any material containing obscenity and to require that programming intended for adult audiences be channeled into one or more late night time slots during which children are not expected to be watching.[4] Access managers may also

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[3] *See, e.g.*, GRTV, *Welcome to GRTV Cable Channel 25*, *available at* http://grtv.org/index.html ("GRTV provides a forum for legal, non-commercial speech, a place where you can express yourself creatively at little or no cost.") (last visited June 12, 2006); *see also, e.g.*, Seattle Community Access Network, User Handbook, *available at* http://scantv.org/Policy.htm ("SCAN provides channel access for non-commercial, constitutionally protected programming.") (last visited June 12, 2006).

[4] *See, e.g.*, GRTV, *GRTV Rules and Policies*, § 10k, *available at* http://grtv.org/policies.htm#programming (sponsor of programming should notify the Programming Department that a program contains adult content and the program "should air between the hours of 10:00 pm and 6:00 am"); *Capital Community Television Rules and Procedures Handbook* at p. 6 (March 2005) ("*Capital Community Handbook*"), *available at* http://www.cctvsalem.org/pdfs/rules_procedures.pdf (limiting TV14 programs to a time slot between 11 pm and 5 am and TVMA programs to between 1:00 am and 4:00 am).

require programming to contain ratings or other adult content advisories.[5] This Court, in *Denver Area*, recognized the efficacy of these locally governed systems for the oversight of constitutionally protected speech on access channels:

> Whether these locally accountable bodies prescreen programming, promulgate rules for the use of public access channels, or are merely available to respond when problems arise, the upshot is the same: There is a locally accountable body capable of addressing the problem, should it arise, of patently offensive programming broadcast to children, making it unlikely that many children will in fact be exposed to programming considered patently offensive in that community.

518 U.S. at 763 (internal citations omitted).

And, in fact, the process followed by the public access channel here worked precisely as the *Denver Area* Court contemplated: Petitioner Huffman's show was cablecast at 10:30 P.M in the evening, consistent with the local public access organization's time segregation policy. *See* Huffman Pet. at 2 and note 4 *supra*.

REASONS FOR GRANTING THE WRIT

The court of appeals' sanctioning of the use of a public indecency statute to ban, and criminalize, non-obscene cable programming containing nudity that offends a single viewer, even if the programming is time segregated, is an "obvious" error in light of *Denver Area* and *United States v.*

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[5] *See, e.g., Capital Community Handbook* at 6.

Playboy Entertainment Group, 529 U.S. 803 (2000), and summary reversal is therefore appropriate. *Gonzales v. Thomas*, 126 S.Ct. 1613, 1615 (2006). But in any event, review is appropriate. Otherwise, the chilling effect of criminal liability spawned by the decision below will inevitably spread to public access programmers, and to other cable programmers, nationwide.

I. THE DECISION BELOW IS DIRECTLY CONTRARY TO CLEAR AND CONTROLLING FIRST AMENDMENT RULINGS OF THIS COURT.

Certiorari is appropriate in this case because the decision of the Court below is in direct conflict with clear and controlling precedent of this Court[6] establishing that (1) the complete banning of constitutionally protected, indecent programming on cable television violates the First Amendment, *Playboy*; *Denver Area*; and (2) the application of facially content-neutral statutes to criminalize the distribution of film or television programming containing nudity is an impermissible content-based restriction on speech, not content-neutral regulation of expressive conduct, *see, e.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). Michigan's prohibition of indecent speech on cable television through imposition of "the opprobrium and stigma of a criminal conviction," *Reno v. ACLU*, 521 U.S. 844, 872

[6] *See* Sup. Ct. R. Rule 10 (c) (review on writ of certiorari may be appropriate if "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court"); *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 362 (1984) ("We are concerned with federal issues and a contention that a state court disregarded a federal constitutional ruling of this Court.").

(1997), cannot survive the strict scrutiny applicable to content-based regulation of "offensive" cable programming.

A. This Case is Clearly Controlled by *Playboy* and *Denver Area*. This Court has twice struck down governmental efforts to ban indecent programming on cable television because cable programming is speech protected by the First Amendment.

In *Denver Area*, this court struck down a provision in the Cable Television Consumer Protection and Competition Act of 1992[7] that permitted cable operators "to prevent transmission of 'patently offensive' programming ... on public access channels." 518 U.S. at 760. "Patently offensive" programming was defined to include that which "describes or depicts sexual or excretory activities or organs in a patently offensive manner." *Id.* at 732. The Court recognized "the basic, legitimate objective of protecting children from exposure to 'patently offensive' material," *id.* at 733, but held that a ban on indecent programming is not appropriately tailored to achieve that end because "time segregation [and] adult content advisories" offer less restrictive means of protecting children from indecent programming on public access. *Id.* at 762; *see also id.* at 756 (discussing availability of lock boxes to block public access channels at the subscriber's request).

The Court visited the issue again in *Playboy*, which considered a congressional effort to prohibit cable operators from allowing indecent images from adult channels to be viewable during daytime hours through "signal bleed." 529 U.S. at 808. In striking down that congressional enactment,

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[7] Pub. L. No. 102-385, 106 Stat. 1460 (1992), *codified as* amendments to Title VI of the Communications Act of 1934.

the Court held that the First Amendment standard for assessing content-based restrictions on indecent cable programming is "clear: The standard is strict scrutiny." *Id.* at 814. The Court further held that indecent cable programming is protected speech, not conduct, under the First Amendment, *id.*; that legislation targeting such speech is content-based regulation, *id.*; and that the broadcast indecency standard of *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978), does not apply to cable programming, 529 U.S. at 815.

At the heart of the many errors made by the court below is its effort to sidestep *Playboy* and *Denver Area* by equating images of conduct depicted in a cable program to conduct rather than speech.[8] The court of appeals' wrong turn on the speech-versus-conduct question led it down the mistaken path of concluding that the First Amendment "issue is governed by a case concerning draft card burning ... and two cases [involving] nude dancing," *Huffman*, 266 Mich. App. at 362 (citations omitted), and therefore subject to intermediate scrutiny, rather than the strict scrutiny standard compelled by *Playboy.* The court compounded its error by concluding that the broadcast standard of *Pacifica* "applies to cable television broadcasting," such that cable programming, like broadcast, has "the most limited First Amendment protection," *id.* at 368 (quoting *Pacifica*, 438 U.S. at 748), despite this Court's explicit rejection of that proposition in *Playboy*, 529 U.S. at 815. Based on this series of errors, the court below held that Michigan may completely ban and

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[8] *People v. Huffman*, 266 Mich. App. 354, 368 (2005), *appeal denied*, 474 Mich. 999 (2006) (distinguishing *Playboy* and *Denver Area* as "simply inapposite to the question presented in this appeal" because those cases involved "content-specific restrictions on speech itself," rather than "content-neutral restrictions on expressive conduct that constitutes symbolic speech").

punish, through its criminal law, the production and dissemination of images of nudity on cable television based on nothing more than a single adult viewer's finding of such images offensive. *Huffman*, 266 Mich. App. at 359-61.

The Michigan Court of Appeals' holding that criminalizing the "produc[tion] and arrange[ment] for the cable transmission of a television show" is "expressive conduct," not speech, *Huffman*, 266 Mich. App. at 356, 369, defies five decades of this Court's First Amendment jurisprudence. It has been clear since this Court's decision in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-502 (1952), that distributing film is a form of speech subject to the full protection of the First Amendment,[9] not expressive conduct that "falls only within the outer ambit of the First Amendment's protection."[10] The same protection long accorded to film shown in movie theaters extends to television programs shown on cable channels. "Cable programmers . . . engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner*, 512 U.S. at 636. This Court has never held that the production or dissemination of film or television programming is anything other than pure speech. It has never suggested that such programming

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[9] *Burstyn* involved an appellant "engaged in the business of distributing motion pictures" who was prevented from distributing an Italian film in New York that was judged by a review board to be "sacrilegious." 343 U.S. at 497-98.

[10] *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (citation omitted). *Cf. Jenkins v. Georgia*, 418 U.S. 153 (1974) (reversing conviction under statute making it a "crime to exhibit a motion picture portraying acts which would constitute 'public indecency' . . . if performed in a public place").

becomes conduct because of the content of the conduct it depicts.

The court of appeals' holding that the enforcement of a general criminal law to ban indecent speech on cable television is "content-neutral" is similarly at odds with decades of this Court's established precedent. Whatever the law says on its face, the obligation of this Court is to review Michigan's indecent exposure statute "as construed and applied" by the state. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). *Accord Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 131 (1992). As construed and applied by Michigan's prosecution authorities and courts, its indecent exposure law does more than ban nudity in public places; it now criminalizes "televising an image" that would constitute an indecent exposure if "staged . . . in a traditional 'public square,' like Grand Rapids' downtown Calder Plaza." *Huffman*, 266 Mich. App. at 360.

The enforcement of a general conduct law to criminalize offensive speech is a content-based restriction on speech subject to strict scrutiny under the First Amendment. Thus, when the City of Jacksonville sought to use its general nuisance law "to protect its citizens against unwilling exposure" to potentially "offensive," but not obscene, images of nudity visible from a drive-in theater, the Court treated the application of that nuisance law as a content-based regulation of speech, not under the *O'Brien* standard[11] applicable to content-neutral regulations of expressive conduct. *Erznoznik*, 422 U.S. at 208. Similarly, the Court rejected the efforts of the plaintiff in *Hustler Magazine v. Falwell* to evade strict scrutiny under the First Amendment by fashioning his action

[11] *United States v. O'Brien*, 391 U.S. 367 (1968).

for the punishment of protected speech as one for intentional infliction of emotional distress rather than libel.[12]

The Court's holdings in this area are clear: whether under the guise of a law that facially regulates the content of speech, or through enforcement of a general law making no reference to speech or its content, "when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." *Erznoznik,* 422 U.S. at 209.

The court below sanctioned this very kind of censorship. Indeed, it applied Michigan's indecent exposure statute to Huffman's program *precisely because* "a televised exposure . . . can be more offensive and threatening" than an in-person exposure, and, "therefore, powerfully effective."[13] This focus on the reaction of the viewer to the speech is the hallmark of a content-based regulation. "The overriding justification [for Petitioner's conviction under this statute] is concern for the effect of the subject matter" on viewers. *Playboy,* 529 U.S. at 811. "This is the essence of content-based regulation." *Id.* at 812. Cases such as Huffman's,

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[12] 485 U.S. 46, 53 (1988) ("Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject.").

[13] *Huffman*, 266 Mich. App. at 360-61, Huffman was not convicted under Michigan's indecent exposure law for exposing his penis in what is conventionally considered a public place, *e.g.*, on the streets or sidewalks, on public transportation or in a place of public accommodation. Huffman was convicted for "producing and submitting the Dick Smart tape for cable distribution." *id.* at 359, 362 (explaining that "no one allegedly observed the taping or took offense because of it").

where the government seeks to punish a cable programmer for showing indecent cable programming, "involve[] speech alone," *Playboy*, 529 U.S. at 814, and therefore are subject to strict scrutiny.

B. Huffman's Conviction Cannot Survive the Required Strict Scrutiny under This Court's Precedent. Content-based regulation of speech is "presumptively invalid," and "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Id.* at 817 & 818. "If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest." *Id.* at 813. Under this Court's precedent, Huffman's conviction cannot survive strict scrutiny.

As an initial matter, the State disclaimed any government interest that could be classified as compelling. It conceded below that "[t]he People do not assert an interest in protecting children as a justification for the indecent exposure statute generally or this prosecution in particular."[14] The court below similarly held that "the governmental interest served by the text of the [indecent exposure] prohibition" is not the protection of children, but "societal disapproval of nudity in public places and among strangers." *Huffman*, 266 Mich. App. at 366 (quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 571-572 (1991)).

The only compelling governmental interest that this Court has ever recognized for the suppression of First Amendment-protected speech based on its "offensive" content is the need to protect unsupervised children from

[14] Answer in Opposition to Defendant's Motion to dismiss at 8, filed with the trial court on April 9, 2001.

exposure to indecent material. *See Denver Area*, 518 U.S. at 743. Societal disapproval of unwelcome images of nudity in cable television programming is not a compelling state interest justifying the suppression of such speech. "Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails . . . ." *Playboy*, 529 U.S. at 813. "In evaluating the free speech rights of adults," this Court has "made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.'" *Reno*, 521 U.S. at 874 (quoting *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989)).[15]

Moreover, the total banning, and criminalization, of indecent programming even at the late night hours when Huffman's broadcast aired, are the antithesis of narrow tailoring.[16]

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[15] *See also Denver Area*, 518 U.S. at 807 (government may not "reduce the adult population . . . to . . . only what is fit for children") (internal quotation marks omitted) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)); *Boos v. Barry*, 485 U.S. 312, 322 (1988) ("As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment" (internal quotation marks and citations omitted); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983) ("the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox"); *Pacifica* 438 U.S. at 745 ("the fact that society may find speech offensive is not a sufficient reason for suppressing it"); *Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977) ("Where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression").

[16] Although governments may regulate the time, place and manner of constitutionally protected speech, "even where speech is indecent and

II. IF NOT REVIEWED AND REVERSED BY THIS COURT, THE DECISION BELOW WILL SPAWN WIDESPREAD CHILLING OF CONSTITUTIONALLY PROTECTED CABLE PROGRAMMING.

A second compelling reason for granting certiorari in this case is the broad potential chilling effect of the decision below on public access programmers and other cable programmers, not only in Michigan but elsewhere across the country.

This Court has often recognized that criminal sanctions are an intolerably blunt weapon for regulating protected speech, and that their strong deterrent effect "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."[17]

Public access programmers produce programming that involves images of nudity that would almost certainly be

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enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative." *Playboy*, 529 U.S. at 813-814. *See also Denver Area,* 518 U.S. at 820 (Thomas, J., Rehnquist, C.J., and Scalia, J., concurring in part, dissenting in part) ("Certainly, under our current jurisprudence, Congress could not impose a total ban on the transmission of indecent programming."); *Sable Communications*, 492 U.S. at 127 ("*Pacifica* is readily distinguishable from these cases . . . because it did not involve a total ban on broadcasting indecent material"); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) ("the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value").

[17] *Reno,* 521 U.S. at 872 (concluding that criminal sanctions in the Communications Decency Act "poses greater First Amendment concerns than those implicated by the civil regulation reviewed in *Denver Area*").

illegal in Michigan if the same material were staged live in the public square. This programming might include, for example: "Beyond the Loss of the Breast," an award-winning documentary about breast cancer victims that was shown on Palo Alto's public access channel; a video of a home birth shown in Amherst, Massachusetts; Cambridge Community Television's cablecast of a program entitled "Truth or Consequences: A Guide to Safe Sex at MIT"; "Health in America," a monthly Sacramento program that discusses alternative health-care options and has included images of women with mastectomies and damaged breast implants; and the "HealthVisions" series, produced by Good Samaritan Hospital and Medical Center of Portland, Oregon, which has included programs entitled "PMS: Breaking the Cycle" and "Understanding Impotence: A Common and Treatable Problem."[18] This Court has noted the existence of other examples of programs containing nudity that some individuals certainly could find offensive, but nonetheless are clearly constitutionally protected speech, including depiction of a self-help gynecological examination, nude scenes in a movie, and a safe sex program. *Denver Area,* 518 U.S. at 765-66.

If Michigan's use of its public indecency statute to criminalize nudity on cable television were allowed to stand, the effects are unlikely to be confined to Michigan. This Court noted in *Barnes* that public indecency regulations trace their origin to the common law and exist in at least 47 states.

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[18] *See* Patricia Aufderheide, *Public Access Cable Programming, Controversial Speech, and Free Expression* (Center for Social Media, School of Communication, American University, 1992); Margie Nicholson, *Cable Access: A Community Communications Resource for Nonprofits*, Bulletin 3 (Benton Foundation, Washington D.C., April 1990).

501 U.S. at 568. Much like the Michigan statute at issue here, a common formulation of the crime of indecent exposure in other states requires that the exposure occur "under circumstances" in which the conduct is likely to cause "affront" or "alarm."[19] Other laws broadly prohibit exposures of nudity in any place where others have "access,"[20] where the exposure "may reasonably be expected to be viewed" by others,[21] or even where the exposure can be seen from the private premises of another.[22] Thus, the indecent exposure

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[19] *See* DEL. CODE ANN. tit. 11 §764-765 (2006); KY. REV. STAT. ANN. § 510.148 (2005); ME. REV. STAT. ANN. tit. 17A, § 854 (2006) ; MONT. CODE ANN. § 45-5-504 (2005); N.H. REV. STAT. ANN. §645:1 (2006); 18 PA. CONS. STAT. ANN. § 3127 (West 2000); R.I. GEN. LAWS §11-45-1 (2005); UTAH CODE ANN. § 76-9-702 (2005); W. VA. CODE ANN. § 61-8-9 (West 2006); *see also* HAW. REV. STAT. § 707-734 (2005) (criminalizing exposure "under circumstances in which the actor's conduct is likely to cause affront"); N.J. STAT. ANN. §2C:14-4 (2006) (criminalizing exposure where person "knows or reasonably expects is likely to be observed by other nonconsenting persons who would be affronted or alarmed"); S. D. CODIFIED LAWS § 22-24-1.2 (2005) (under circumstances ... likely to annoy, offend, or alarm); *see also* WASH. REV. CODE §9A.88.010 (West 2006) ("... knowing that such conduct is likely to cause reasonable affront or alarm"). ARK. CODE. ANN. § 5-14-112 (West 2006); COLO. REV. STAT. ANN. § 18-7-302 (West 2006) (same).

[20] TENN. CODE. ANN. § 39-11-106 (West 2006).

[21] CONN. GEN. STAT. ANN. §53a-186 (West 2001 & 2006 Supp.); GA. CODE ANN. § 16-1-3 (West 2005); *see also* LA. REV. STAT. ANN. §14:106 (2006) (criminalizing exposure in "any public place or place open to the public view"); N.M. STAT. ANN. § 30-9-14 (West 2006) (criminalizing exposure "to public view").

[22] ALA. CODE § 13A-6-68 (2005); FLA. STAT. ANN. § 800.03 (West 2006) (same); ME. REV. STAT. ANN. tit. 17-A, § 854 (2006) (same); N.Y. PENAL LAW § 245.00 (McKinney 2006) (same); OR. REV. STAT. ANN. § 163.467 (2003) (exposure illegal "where another person has a reasonable expectation of privacy").

laws of many states are highly susceptible to the same interpretation as that adopted by the court below: to reach televised images distributed "under circumstances which create a substantial risk that someone might be offended." *Huffman*, 266 Mich. App. at 360 (quoting *People v. Vronko*, 228 Mich. App. 649, 656 (1998)).

Nor is the decision below necessarily limited to programming on public access channels. Noted First Amendment scholar Eugene Volokh has concluded that the sweep of the reasoning of the court below "would apply equally to any cable company that carries HBO, or any other channel that sometimes carries nudity."[23]

There is ample reason to believe that prosecutors in other states will be urged to follow Michigan's lead.

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[23] Eugene Volokh, *It's a Crime for Cable Companies to Offer HBO in Michigan*, The Volokh Conspiracy (May 23, 2005 updated May 28, 2005), http://volokh.com/archives/archive_2005_05_22-2005_05_28.shtml (May 28, 2005). Professor Volokh added:

> Under the court's logic, the company — corporations are generally treated as "persons" — and those working for it are making "open or indecent exposure . . . of the person of another." Likewise, HBO executives, who surely must know that their material would be carried in Michigan, would probably be committing a crime.

Id. This risk is not hypothetical. HBO has televised a 20 minute segment of clips from the international traveling show, "Puppetry of the Penis," featuring two men who "manipulate their male organs into a variety of shapes including that of the Eiffel Tower, the Loch Ness monster, a wind-surfing sail and a hamburger." Nancy Van Valkenburg, *KSL passes on NBC's risque comedy*, Standard-Examiner (Oct. 10, 2002), *available at* http://www.puppetryofthepenis.com/download/pop%20Standard%20Examiner%20News%20/pdf.

Advocacy groups are already mobilizing to "encourage the state Attorney General to enforce indecency law on cable television by using state law" to prohibit all nudity on cable television.[24] These groups see Michigan as "pioneering what could be a new approach to the prosecution of indecent material on cable television" that will allow state law to "be used to reach national broadcasters on cable TV who put out indecent material."[25]

If the decision below is allowed to stand, access programmers around the country that cablecast any non-obscene programming that includes nudity, even if time segregated, will face the risk of criminal prosecution under public indecency laws. It is difficult to imagine a more direct and pervasive chilling effect on protected speech. Such a chilling effect is anathema to this Court's First Amendment jurisprudence, and this Court's review is therefore warranted.

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[24] Josh Montez & Teresa Neumann, *Michigan Fighting Nudity on Cable TV* (Mar 3, 2006), http://www.injesus.com/index.php?module=message&task=view&MID=ET00ANN5&GroupID=0B001BSP.

[25] Pete Winn, *Michigan Court: TV Indecency the Same as Indecent Exposure*, Focus on the Family, citizenlink.org (February 27, 2006), http://www.family.org/cforum/news/a0039672.cfm.

CONCLUSION

This case merits summary reversal in light of the Court's decisions in *Playboy* and *Denver Area*. Alternatively, the Court should grant the writ and entertain full briefing on the important constitutional issues at stake. Allowing Huffman's conviction to stand would cast a pall over cable programmers across the nation who will be deterred from airing potentially offensive speech for risk of criminal prosecution.

Respectfully submitted,

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